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Submission to the Department of Immigration and Border Protection in relation to the Policy Consultation Paper: *Visa Simplification: Transforming Australia's Visa System*

The Refugee Advice & Casework Service (RACS) is a specialist refugee legal centre and has been assisting people seeking protection in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on the Policy Consultation Paper.[1] We consider the objective of simplifying the Australian visa system to be laudable, and that greater simplicity has the capacity to enhance the visa system's fairness, alongside other goals. Although no concrete measures are detailed in the Consultation Paper, the contemplated reforms are potentially generational in their significance and may have dramatic impacts upon Australian society. For this reason, we consider that further consultation with broad sectors of the community would be essential in relation to the detail of any proposed reforms.

1. Four principles for a transformed visa system

The Consultation Paper calls for identification of the key characteristics of a simplified and flexible visa system, and the factors that should be considered in designing it. This section sets out four principles which RACS considers ought to guide any reform process. These principles reflect the significance of certainty and stability to integration outcomes, the special situation of visa-holders in the Refugee and Humanitarian program and the importance of transparency and rule of law. They are not an exhaustive statement of relevant considerations, but principles which are most relevant to our experience and expertise.

Principle 1: Direct access to permanent residency has significant benefits and is the appropriate policy response for some groups of migrants.

Principle 2: Migrants who have committed to living in Australia and who Australia has accepted should not face unnecessary barriers toward full integration into the Australian community, including citizenship.

[1] Department of Immigration and Border Protection, *Policy Consultation Paper - Visa Simplification: Transforming Australia's Visa System*, (August 2017), available at https://www.border.gov.au/Trav/visa-reform/policy-consultation-paper (accessed 14 September 2017) (Consultation Paper).

Principle 3: The Refugee and Humanitarian programme involves a distinct cohort of migrants with particular needs that should be recognised and supported by the design of the visa system.

Principle 4: The values of rule of law, separation of powers and open government are fundamental to a responsible, functional and attractive migration system.

Each principle is discussed in turn below.

Principle 1: Direct access to permanent residency has significant benefits and is the appropriate policy response for some groups of migrants.

People travel to Australia for a variety of reasons and these reasons call for different kinds of visa frameworks. The Consultation Paper makes the 'key statement' that specific short-term activities such as visit, study or temporary skilled work can be appropriately managed with temporary visas. For other migrants, provisional periods of residency or transitional periods prior to permanent residency may be appropriate policy tools.

However, there are compelling reasons for some categories of migrants to have access to permanent residency from the outset, in line with many elements of existing policy. The grant of a permanent visa allows individuals and families to make plans for the future in relation to study, work, finances and family life. It lifts the psychological burden of uncertainty. As well as providing individual benefits, these are social goods that allow individuals and families to fully embrace community values and more rapidly begin to contribute to the fabric of Australian society. By contrast, periods of temporary or provisional status may lead migrants to 'invest less in social capital, which has potential consequences for their social assimilation and the segregation of immigrant communities.'[2] This is a negative outcome for both the migrants affected and the wider community. Accordingly, whatever framework underlies the visa system, direct and immediate access to permanent residency will always be most appropriate for some classes of migrants.

Principle 2: Migrants who have committed to living in Australia and who Australia has accepted should not face unnecessary barriers toward full integration into the Australian community, including citizenship.

After Australia has determined that an individual or family should be allowed to enter and/or remain in the country indefinitely, it is in the interests of both the individuals and the public that they are offered the opportunity to take up Australian citizenship within a reasonable period of time. Social unity is served by allowing all residents who have demonstrated a commitment to life in Australia to fully engage with civic life. This is best served by a realistic and accessible pathway to citizenship for those who wish to pursue it. Further, research by the Department of Social Services, for example, demonstrates that access to Australian citizenship is associated with better reported general health among migrants.[3]

The Consultation Paper states that the reform of the Australian visa system is designed to ensure that it supports 'national economic, social and security interests.' Conferral of

[2] Christian Dustmann, and Joseph-Simon Görlach, 'The Economics of Temporary Migrations' (Working Paper No 729, *SOEPpapers on Multidisciplinary Panel Data Research*, January 2015) 41.
[3] Jim Walmsley, Alison McIntosh, Kerry Carrington, Michael Bittman, Fran Rolley and Raj Rajaratnam, 'Social Capital' in Kerry Carrington, Alison McIntosh and Jim Walmsley (eds), *The Social Costs and Benefits of Migration into Australia* (Commonwealth of Australia, 2007), 41, available at <https://www.dss.gov.au/sites/default/files/documents/01_2014/contents_exec_summary_and_intro_access.pdf> (accessed 14 September 2017).

citizenship, however, is predominantly concerned with the integration of long-term residents. Accordingly, however the Australian visa system is transformed, the combined operation of immigration and citizenship policy should ensure that prospective Australian citizens do not face longer overall wait periods or new barriers to integration in Australia.

Principle 3: The Refugee and Humanitarian programme involves a distinct cohort of migrants with particular needs that should be recognised and supported by the design of the visa system.

Australia has a long history of contributing to solutions to displacement situations through refugee resettlement, including through UNHCR referrals of recognised refugees under the offshore humanitarian visa programme.[4] The onshore component of the programme gives effect to Australia's non-refoulement obligations under international refugee law and international human rights law. Unlike other areas of Australian immigration policy, the Refugee and Humanitarian programme is predicated on the unique rationale of providing humanitarian assistance to vulnerable people. This cohort requires targeted assistance for successful socioeconomic inclusion.

Any reform of Australia's visa system should not have a negative impact on the scale or success of the resettlement programme or Australia's ability to meet its international legal obligations. Further, while the visa system may provide additional entitlements for policy reasons, the rights to which Refugee and Humanitarian visa-holders are entitled under the visa system must be consistent with international human rights law. In particular, the rights to which refugees in Australia are entitled must be consistent with the socio-economic rights guaranteed by the 1951 Refugee Convention.[5]

Principle 4: The values of rule of law, separation of powers and open government are fundamental to a responsible, functional and attractive migration system.

Fairness and the rule of law contribute to the perception of Australia as an attractive place to live. The existing visa system is subject to processes and guarantees that generate confidence that individuals' rights and interests will be respected and protected. Migrants, prospective migrants and the wider community trust merits review systems to provide protection against incorrect decisions, as well as courts to protect procedural fairness in administrative decision-making and a publicly accountable legislative process to undergird any substantial changes to the legal system. Confidence that Australia will not undermine individuals' accrued rights and that individuals will have access to fair process before reasonable decision-makers in relation to decisions affecting them, contribute to the perception of Australia as a highly-regarded destination for migration.

These safeguards enact Australia's commitment to democratic governance and the rule of law. Stable and predictable immigration policy and legal certainty are important to attracting new migrants and contribute to the retention of skilled migrants.[6] As the current reform process aims to ensure that our visa system supports Australia 'as a competitive and

[4] Department of Immigration and Border Protection, 'Australia's Humanitarian Programme 2017-18' (Discussion Paper, 2017) 4, available at <https://www.border.gov.au/ReportsandPublications/Documents/discussion-papers/discussion-paper-humanitarian-programme_2017-18.pdf> (accessed 14 September 2017).
[5] See eg James Hathaway, *The Rights of Refugees under International* Law (Cambridge University Press, 2005); Rosa da Costa, 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations' *UNHCR Legal and Protection Policy Research Series,* June 2006, available at <http://www.unhcr.org/44bb90882.pdf> (accessed 14 September 2017).
[6] Frances Buckley, 'The Political Economy of Immigration Policies' (1996) 16(1) *International Review of Law and Economics* 81, 93.

attractive destination for temporary and longer-term entrants,' it is vital that the Australian visa system maintains a reputation for predictable and stable policy. Any new framework for Australia's visa system should be transparent and subject to robust mechanisms for review of incorrect or legally flawed decisions.

2. Application of principles to specific policy areas

We understand that specific proposals for reform are yet to be formulated, but welcome the opportunity to comment on the ideas in the Consultation Paper.

2.1 Permanent visas in the Refugee and Humanitarian programme

The Consultation Paper refers to periods of provisional residency for all residents prior to eligibility for a permanent visa. This would be inappropriate in relation to the Refugee and Humanitarian programme.

Historically, the visa system has typically provided direct access to permanent residence to all refugees in Australia. There are strong humanitarian and social policy reasons for this. As noted in relation to Principle 3, it is well documented that uncertainty is detrimental to the successful resettlement and integration of refugees. The introduction of a provisional stage is likely to establish new barriers for refugees in relation to securing work and making long-term decisions affecting their families. Further, barriers of this kind exacerbate the consequences of torture and trauma, which affect a large proportion of the Refugee and Humanitarian cohort.[7] A University of New South Wales study in relation to the temporary protection visa regime in place between 1999 and 2008 found that the refugees affected had a 700% increase in risk for developing depression and post-traumatic stress disorder compared to refugees with permanent visas.[8]

One of the suggested reasons for the introduction of a provisional or temporary stage to the Australian visa framework is to permit the evaluation of visa-holders' commitment to living in Australia. While this analysis may be relevant to some categories of visa-holders, such as Skilled or Student visa applicants, it is inapplicable to the Refugee and Humanitarian programme. Departmental research published in 2011 found that longitudinal studies on Australia's migrant intake consistently show that refugee arrivals are far less likely than other categories to depart Australia once they arrive.[9] The statistics suggest that refugees who are in Australia are rarely engaged in a cost-benefit analysis as to whether Australia is 'right for them.' They have been permitted to come to or remain in Australia because their countries of citizenship or prior residency are unsafe for return. Accordingly, the suggested policy rationale for a provisional visa stage is a poor fit for the existing Refugee and Humanitarian stream, and would serve to impose unnecessary hardship on a vulnerable group, with undesirable consequences.

[7] Michael Leach and Fethi Mansouri, *Lives in Limbo: Voices of Refugees Under Temporary Protection* (UNSW Press, 2004) 82.
[8] Senate Legal and Constitutional Affairs Committee, *Administration and Operation of the Migration Act 1958: Chapter 8 - Temporary visas, bridging visas, and cost shifting* (2006) [8.14].
[9] Graeme Hugo et al, 'Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants' (Final Report to Department of Immigration and Citizenship, May 2011) 104, available at <https://www.border.gov.au/ReportsandPublications/Documents/research/economic-social-civic-contributions-about-the-research2011.pdf> (accessed 14 September 2017).

2.2 Important features of any 'provisional' system applying to Refugee and Humanitarian visa applicants

While RACS considers that Principles 1-3 suggest that visas in the Refugee and Humanitarian programme should be permanent visas, the following features would be essential in the case that a provisional stage were to be introduced.

2.2.1 Strictly limited criteria for transition to the permanent visa

Notwithstanding the criteria that may be applied to whether other categories of migrants are eligible for a permanent visa, RACS would discourage the imposition of onerous requirements for Refugee and Humanitarian stream migrants to transition from provisional to permanent visas.

In particular, the question of whether a visa-holder continues to be a person in respect of whom Australia has protection obligations should not be revisited. Assessment of visa applications involving this question is complex and lengthy, and often requires applicants to recount traumatic experiences at length. Although it is possible in law for changes to a refugee's circumstances to lead to the cessation of their refugee status, contemporary causes of displacement are such that cessation is of limited relevance to the visa system.[10] This is because by the time an Australian resident's refugee status ceases, their contribution and connection to Australian society will, in many cases, support compelling policy reasons for them to remain in Australia on other grounds. A framework which would require Refugee and Humanitarian visa-holders to repeatedly demonstrate their protection needs would epitomise the kind of 'expensive to maintain and difficult to navigate' system that the reform process would seek to avoid.[11]

For Refugee or Humanitarian visa-holders, criteria for transition to a permanent visa should also avoid requirements relating to financial means or social status in Australia. As described in relation to Principle 3, the Refugee and Humanitarian Programme is designed as a form of targeted humanitarian assistance to people who Australia recognises as vulnerable to harm, and addresses different policy objectives to the Skilled, Family or other visa streams. While other transitional criteria may be appropriate for visa categories for migrants selected based on their skills or existing connections to Australia, they would be inappropriate for a person whose presence in Australia the result of their vulnerability and disenfranchisement.

Recent analysis of the longitudinal data from the 'Building a New Life in Australia' study shows that while humanitarian migrants generally face greater immediate and short-term difficulties in finding work in Australia than other categories of migrants, their economic self-sufficiency tends to increase dramatically over time, in line with their integration and recovery from trauma.[12] The imposition of criteria relating to 'integration' of refugees at the stage of transition from provisional to permanent visa status is likely to skew access to

[10] Any reassessment of whether refugee status has ceased must reflect the procedural requirements around article 1C of the 1951 Refugee Convention. This is a more demanding standard than first-instance refugee status determination: James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 478.
[11] Consultation Paper.
[12] Zhiming Cheng, Ben Zhe Wang, Lucy Taksa, 'Labour Force Participation and Employment of Humanitarian Migrants: Evidence from the Building a New Life in Australia Longitudinal Data' (Discussion Paper No 106, Global Labor Organization, 10 July 2017) available at <https://www.econstor.eu/bitstream/10419/167617/1/GLO-DP-0106.pdf> (accessed 14 September 2017).

permanent residency away from vulnerable Australian residents with the greatest need for assistance and inclusion. Accordingly, consideration of 'integration' factors for transition from provisional to permanent residency would be inappropriate for Refugee and Humanitarian visa-holders.

If a provisional stage were to be introduced for any visa in the Refugee and Humanitarian programme, RACS would therefore recommend that the criteria for transition from provisional to permanent visa status should be strictly limited.

2.2.2 Access to family reunion must be available for refugees at any provisional stage

The Australian government has made several international commitments to respect the right of all migrants to family unity, and recently affirmed in the 2016 New York Declaration the particular importance of this right to resettled refugees. Following his visit to Australia earlier this year, the UN Special Rapporteur on the Human Rights of Migrants said that:

> 'Families should never be separated for immigration purposes for long periods. In particular, families of vulnerable migrants should never be separated at all.'[13]

In addition to the significance of family unity in human rights law, access to family reunion has a direct impact on resettlement and integration outcomes in host countries and should not be delayed for the duration of any provisional visa stage.

2.2.3 Provisional stage visas must allow equivalent access to social services as permanent visas

In light of the vulnerabilities identified in relation to Principle 3, the Australian Government currently provides a range of support services and assistance to resettled refugees in Australia. The current policies in this area are laudable, and their value should not be diluted or obscured by the reform of the visa system. Accordingly, social services, (including employment assistance, social security and specialised education and treatment as required), should be available to provisional Refugee and Humanitarian visa holders on terms no less beneficial than those available to permanent visa holders. Indeed, because the nature of the Refugee and Humanitarian programme is such that targeted support services are more necessary at the early stages of resettlement, the logic of entitlements that expand with each stage of the migration pathway is inappropriate to this area of the immigration programme.

2.3 Outsourcing of visa assessments

The Consultation Paper outlines the possibility of managing the strain on Departmental resources by 'partnering with industry' to make assessments of certain visa criteria. While this may be appropriate for certain specific functions such as the gathering of biometrics or consideration of purely technical visa criteria, it would be inappropriate for third-party contractor to be involved in the assessment of whether an individual is a person to whom Australia has protection obligations. Such an arrangement may unjustifiably reduce the availability of appropriate review and may undermine compliance with international obligations. Determinations of refugee status are complex and weighty processes that should be subject to robust procedural safeguards, in accordance with Principle 4.

[13] *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru*, 35th sess, Agenda Item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 11 [49].

2.4 Legislative codification of essential provisions and principles

The Consultation Paper identifies a need for a 'flexible and agile visa system [which] would allow the Government to respond quickly to local and global trends.' We understand that such flexibility may require rapid implementation by the executive branch of government, such as through published policies, legislative instruments or the reasonable exercise of discretion. Existing examples of this can be seen in areas requiring technical migrant selection processes that reflect changing global migration flows, such as student or skilled visa pathways.[14] However, the central and most vital tenets of Australia's immigration framework remains codified in legislation enacted by Parliament, supported by delegated legislation overseen by the Senate and subject to interpretation by the courts. In accordance with Principle 4, this legal framework is essential to ensuring that Australia's visa system reflects the rule of law and is transparent and predictable.

Accordingly, RACS considers that the fundamental legal machinery of the visa system must remain in primary legislation. In particular, any reforms to the Australian visa system should not reduce the extent to which provisions relevant to protection visas are embedded in legislation. This approach serves to demonstrate and enact Australia's commitment to its international obligations, while insulating public servants from political pressure and guaranteeing that amendments are subject to robust democratic scrutiny. Additionally, the specific priorities of the offshore humanitarian programme could be embedded in legislation or regulations, in order to guide its administration. This may permit the reduction of the number of visa subclasses while preserving targeted implementation of policy priorities, such as the specification of particular vulnerable groups.

2.5 Defined and accessible pathways to citizenship

Citizenship carries particular significance in the context of the international refugee system. Whereas states are ordinarily responsible for protecting the rights of their citizens under international law, refugees are people for whom the ordinary relationship between an individual and their country of citizenship has broken down. The special importance of citizenship in this context is recognised by the 1951 Refugee Convention which requires Australia to facilitate refugees' access to citizenship.[15]

In accordance with Principle 2, allowing committed Australian residents to become citizens in a predictable manner is in the interests of both these residents and the wider community. Any changes to the visa system should not increase the total period between a person's indication of a commitment to live in Australia and the conferral of Australian citizenship to that person, especially for visa-holders in the Refugee and Humanitarian program. Whether this is achieved by the maintenance of direct access to permanent visas or adjusting the *Australian Citizenship Act* to compensate for any other structural changes, we recommend that any reform of the visa system should not interfere with the benefits of accessible pathways citizenship for committed long-term residents.

[14] Such as, for example, the current Short-Term, Medium-Term and Long-Term Skilled Shortage Lists which define the scope of availability for many Skilled visas and are published by the Minister as legislative instruments: Minister for Immigration and Border Protection (Cth), *Migration (IMMI 17/072: Specification of Occupations and Assessing Authorities) Instrument 2017,* F2017L00850, 30 June 2017.

[15] Article 34 provides that: The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

3. Other areas for consideration

3.1 Expansion of the ADJR Act to provisional-permanent residency transition decisions

At present, access to judicial review for migration decisions is predominantly on constitutional grounds relating to jurisdictional error.[16] We understand the government's concern with more expansive scope for judicial review to have historically been founded on the fear of abuse of process by applicants who may seek to delay removal from Australia. Accordingly, in general, migration decisions are not available for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which was introduced to serve 'the valuable function of providing a simpler alternative to the technical form of judicial review entrenched in the Constitution.'[17]

This rationale may be comprehensible in the case of first-time onshore applicants who may not have a strong expectation of further stay in Australia. However, if a general 'provisional' visa stage is to be introduced, it may be more appropriate that decisions limiting access to permanent residency are subject a simpler form of judicial review. Currently, many visa applicants struggle to engage with existing avenues for judicial review under the *Migration Act 1958*, and often feel aggrieved by decisions made on technical or procedural grounds. The stakes may be heightened for any new category of provisional residents applying for permanent visas, who are likely to be people who have committed to relocating their lives and families to Australia. The perception of unfairness in decisions relating to this cohort may be mitigated by providing access to judicial review under the ADJR Act.

3.2 Simplification of the Bridging visa framework

At the time of writing, there are eight subclasses of Bridging visa, the criteria for which take up approximately 48 pages of Schedule 2 of the *Migration Regulations 1994*.[18] The applicable law and attendant policy governing which applicants are eligible for these visas at what times, for what period and with what conditions, is immensely complex and can be impossible to navigate for visa-holders and applicants. RACS has encountered situations in which individuals with complex migration and family histories are subject to clauses that exclude them from eligibility for bridging visas and force them into unlawfulness despite good faith efforts to cooperate with the Department.[19] Such gaps, which give rise to unintended and undesirable policy outcomes, may be the kind of unnecessary complexity that should be addressed in the design of a visa system aimed at 'fast, simple and user friendly services.'[20]

We recommend that the Department consider options for simplifying the existing Bridging visa framework, potentially to a single class of Bridging visa with a limited number of conditions and defined durations of stay, with clear and accessible criteria for applicants to meet and apply for as required. Key considerations underpinning such a system should be

[16] Per *Migration Act 1958* (Cth) and *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2.
[17] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report No 127 (2015), 18 available at <https://www.alrc.gov.au/publications/alrc127> (accessed 14 September 2017).
[18] *Migration Regulations 1994* (Cth), Sch 2 items 010-070. Based on the copy available at https://www.legislation.gov.au/Details/F2017C00582/Download as compiled at 14 September 2017.
[19] Under the current framework, for example, people who have applied for Ministerial intervention under s 91Q of the Act are not allowed to apply for a Bridging visa on this basis.
[20] Consultation Paper.

the elimination of complex transitional criteria for different subclasses, and inclusive drafting to avoid gaps resulting in unlawfulness in unusual or unanticipated situations.

4. Concluding remarks

Simplification of the legal system is a positive objective with the potential to enhance access to justice in addition to other goals. However, simplification of the Australian visa system should not come at the expense of fairness or inclusivity, which are essential to the purposes of the Refugee and Humanitarian programme.

The far-reaching implications of the reforms foreshadowed by the Consultation Paper suggest that further community consultation would be essential in relation to any concrete proposals. We look forward to the opportunity to comment on any such proposals as they become available.

Sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC
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